

9.0 CONSISTENCY WITH FEDERAL AND STATE LAWS AND REGULATIONS

9.1 FEDERAL LAWS

9.1.1 Endangered Species Act

The FESA of 1973 (16 USC 1531 *et seq.*) is administered by the USFWS, and by the NMFS in areas where marine habitats exist. Section 7 of the FESA requires federal agencies to use their authorities to conserve threatened and endangered species. It also directs federal agencies to consult with USFWS (or NMFS) if any action they authorize, fund, or carry out “may affect” in either a beneficial or adverse manner, any species that is listed or proposed for listing, or any designated or proposed critical habitat. For example, if the issuance of a CWA Section 404 permit by the Corps for a private development project may affect any listed species, the Corps must consult with USFWS on the effects of the issuance of that permit. Species that are candidates for listing by the USFWS may also be addressed during federal interagency coordination. Section 7 also provides a mechanism for ‘incidental take,’ for actions that may affect a listed species, but which do not jeopardize its continued existence or destroy or adversely modify critical habitat.

Section 9 of the FESA prohibits ‘take’ (i.e., harassment, harm, pursuit, hunting, shooting, wounding, killing, trapping, capture, or collecting, or the attempt to engage in any such conduct) of threatened and endangered species. “Harm” is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. Under Section 10 of the FESA, non-federal entities can apply for a permit exempting them from the “take” prohibition for scientific purposes to aid the species recovery, or for “incidental take,” when the project or activity does not involve a federal action and the take is incidental to, and not the purpose of, an otherwise lawful activity.

Several federally listed species including (and not limited to) the coastal California gnatcatcher (*Polioptila californica californica*) and the least Bell’s vireo (*Vireo bellii pusillus*) are known to occur within the Watershed. Additionally, previously designated critical habitat within the Watershed for the coastal California gnatcatcher informed the SAMP formulation process. Those designated critical habitat areas were included within aquatic resource integrity areas, making most projects impacting aquatic resources within designated critical habitat ineligible for abbreviated permitting. The Department and USFWS developed the NCCP/HCP that provides coverage under Section 10 of the ESA, as well as CESA, to those signatory to the NCCP/HCP or their constituents for certain activities that may affect the covered species.

The Corps has informally consulted with the USFWS throughout the SAMP formulation process to ensure any impacts to federally listed species, or their critical habitat, are not adverse. The Corps has determined that some future activities that would be authorized by the RGP and the LOP procedures may affect federally listed endangered species known to utilize habitat in the Watershed. At this time, the Corps has sufficient information to initiate Section 7 consultation for the establishment of the RGP. Therefore, the Corps will initiate formal consultation on the RGP in a forthcoming letter, pursuant to Section 7 of the ESA. Since the Corps expects to issue subsequent Federal permits under the new SAMP

LOP procedures for future activities that may affect federally listed species, the Corps will, on a project-specific basis initiate consultation with USFWS as appropriate. With respect to obligations under the ESA, mitigation and minimization in the LOP procedures and RGP are considered reasonable and prudent measures for all non-jeopardy Section 7 consultations. Nevertheless, for decisions on specific projects authorized under the LOP procedures that may affect federally listed species, the Corps may undergo separate Section 7 consultations with the USFWS. Similarly, future projects would also be subject to the Department's requirements for CESA. The proposed SAMP/WSAA Process includes the following RGP and LOP general condition for use in the Watershed:

a) No activity is authorized which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the ESA or which will destroy or adversely modify the critical habitat of such species. Non-federal permittees shall not begin work on the activity until notified by the Corps that the requirements of the ESA have been satisfied and that the activity is authorized. (b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. (c) Non-federal permittees shall notify the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. The district engineer will determine whether the proposed activity "may affect" or will have "no effect" to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination within 45 days of receipt of a complete pre-construction notification. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the project, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have "no effect" on listed species or critical habitat, or until Section 7 consultation has been completed. (d) As a result of formal or informal consultation with the USFWS or NMFS, the district engineer may add species-specific regional endangered species conditions to the LOPs. (e) Authorization of an activity by an LOP does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the USFWS or the NMFS, both lethal and non-lethal "takes" of protected species are in violation of the ESA. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. USFWS and NMFS or their World Wide Web pages at <http://www.USFWS.gov/carlsbad> and <http://www.noaa.gov/fisheries.html> respectively."

Consistency Determination: The SAMP/WSAA Process contain provisions for the protection and continued sustainability of listed species, and no Corps authorization can be obtained without compliance with the permit condition as shown above. Some fish species and other marine animals are also covered under the FESA, but are regulated by NMFS (part of NOAA) rather than the USFWS. No issues relating to threatened and endangered fish or other marine species are present within the Watershed, nor are any indirect effects expected to occur to these resources, as described in Section 4.3. The SAMP/WSAA Process is considered to be consistent with the ESA.

9.1.2 Section 401 of the Clean Water Act

For any project seeking authorization from the Corps under the SAMP permitting framework (e.g., LOP, RGP, retained NWP, or SIP) that will impact jurisdictional waters, the applicant must obtain a water quality certification from the Regional Water Quality Control Board (RWQCB) or State Water Resources Control Board (SWRCB). Although the RWQCB has participated as a coordinating agency throughout the SAMP development process, it is not the Corps' intention that the SAMP would fully address the numerous issues under the State Porter-Cologne Act or other sections of the Clean Water Act. Therefore, Waste Discharge Requirements (WDRs) and 401 certifications are not included directly as part of the SAMP regulatory framework, except insofar as the Corps will request a 401 certification for the RGP from the RWQCB and/or the SWRCB. With 401 certification of the RGP, regulated maintenance activities under the RGP would not need to seek an individual 401 certification, but would still be subject to the 401 notification requirements.

According to 33 CFR 330.4, a 401 water quality certification pursuant to section 401 of the CWA, or waiver thereof, is required prior to the Corps Section 404 authorization of a project. Any conditions of a section 401 certification will become conditions of a Corps Section 404 permit. Unless a pre-certification has been obtained (e.g., as with some NWPs or RGPs), a Corps Section 404 permit will not be issued until the applicant provides the Corps with the following information: a Section 401 water quality certification, a waiver thereof, or evidence that 60 days have passed since a complete application was submitted to the RWQCB for certification. In the case of the Corps' LOP procedures, if a Section 401 certification has not been issued within 45 days after submittal of a complete application and the application complies with the conditions of an LOP, the Corps will issue a provisional LOP. To finalize a Corps provisional LOP, the applicant would contact the Corps when the project receives a Section 401 certification or waiver (or when 60 days have passed since complete application was submitted). [Note: The RWQCB reserves the right to regulate discharges under Porter-Cologne in lieu of or in addition to CWA Section 401 certifications.]

Consistency Determination: Proposed projects seeking authorization under the RGP or LOP must demonstrate compliance with Section 401. Also, as required by the Section 404(b)(1) Guidelines, the SAMP/WSAA Process contains provisions to ensure that future activities authorized through the SAMP/WSAA Process will not violate any state water quality standards).

9.1.3 Impaired Waters and Total Maximum Daily Loads (TMDLs)

The TMDL program is required under CWA Section 303(d). CWA Section 303(d) requires states to identify impaired water bodies (i.e. the "303(d) list") and develop TMDLs for them. A TMDL is a

quantitative assessment of water quality impairments, contributing sources of pollutants, and pollutant load reductions or control actions needed to restore and protect bodies of water. The TMDL requirement does not replace existing water pollution control programs. It provides a framework for evaluating pollution control efforts and for coordination between federal, state, and local efforts to meet water quality standards.

Consistency Determination: The SAMP/WSAA Process is consistent with Section 303(d) because individual activities authorized pursuant to the SAMP/WSAA Process will be required to comply with the TMDL requirements.

9.1.4 Rivers and Harbors Act

Section 10 of the Rivers and Harbors Act regulates activities in navigable waters of the U.S. The term “navigable waters of the U.S.” as defined in 33 CFR 329.4 includes those areas subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity including filled, drained, diked, or developed lands that at one time were navigable.

Consistency Determination: Generally, the SAMP/WSAA Process would not apply to activities affecting navigable waters subject to tidal influence since the SAMP/WSAA Process applies to the upper Watershed areas and not Newport Bay directly. However, the lower portion of San Diego Creek within the Watershed is tidally influenced and therefore, future project(s) requiring permits within the tidally-influenced portion of San Diego Creek must demonstrate consistency with the SAMP/WSAA Process and Section 10 of the Rivers and Harbors Act.

9.1.5 Clean Air Act

Pursuant to Section 176(c) of the Clean Air Act, the Corps shall not authorize projects or activities that fail to conform to the State Implementation Plan (see Section 3.5.2 for regulatory background). Conformity means that activities shall not cause or contribute to any new violation of air quality standards for the Basin, increase the frequency or severity of any existing violation of standards, or delay timely attainment of any standard or interim emission reductions.

The formulation of the SAMP/WSAA Process and the development and implementation of an Analytical Framework, a Strategic Mitigation Plan, and Mitigation Coordination Program are all planning efforts that provide technical assistance to the Corps, other federal, state, and local agencies, the public, and the regulated community in the administration of the Section 404 permitting program within the Watershed. These planning and advisory aspects of the federal action do not cause emissions of criteria pollutants or their precursors, and as such are exempt from the general conformity requirements by 40 CFR Part 93.153.

The issuance of a new RGP for maintenance activities is a federal action that would grant permits for projects than are routine, recurring maintenance dredging and debris removal and disposal projects that would result in temporary, short-term, minimal impacts to aquatic resources. The Corps has made a preliminary determination that these types of activities would result in only de minimus increases in direct

mobile source and stationary source emissions of criteria pollutants or their precursors in a non-attainment area, and would be exempted from the general conformity requirements by 40 CFR Part 93.153.

The adoption of procedures for the issuance of LOPs for eligible activities is a federal action that would grant permits for projects that range from recurring maintenance activities to construction-related activities. Both broad categorizations of activities could result in temporary, minimal, or permanent, minor impacts to aquatic resources within the Watershed. Further, the Corps has made a preliminary determination that many of these types of maintenance and construction activities would result in only *de minimus* increases in direct mobile source and stationary source emissions of criteria pollutants or their precursors in a non-attainment area, and would be exempted from the general conformity requirements by 40 CFR Part 93.153.

Additionally, it is acknowledged that certain proposed projects that may otherwise be eligible for authorization under the proposed LOP could have direct mobile source emissions and/or stationary source (e.g., fugitive dust) emissions in exceedence of *de minimus* levels, or could have activities resulting in indirect mobile source or stationary source emissions within the continuing authority of the Corps. However, it is expected that many, if not all of the projects with long-term impacts from indirect mobile source or post-construction stationary source emissions would be included in the baseline inventory for the applicable State Implementation Plan. Nevertheless, to assure compliance with Section 176(c) (General Conformity Rule review) of the Clean Air Act, the Corps has proposed the following permit condition as part of the proposed LOP procedures:

No activity is authorized that causes or contributes to any new violation of National Ambient Air Quality Standards, increases the frequency or severity of any existing violation of such standards, or delays timely attainment of any such standard or interim emission reductions, as described in the applicable California State Implementation Plan for the South Coast Air Basin. As part of the Corps LOP application package, the applicant must submit an air quality emission and impact analysis for the proposed activity if the project would result in long-term or permanent stationary (point or area) source or indirect mobile source emissions, or if the proposed activity would result in area source and direct mobile source emissions that exceed the annual de minimus emissions thresholds for any criteria air pollutant or its precursors.

Consistency Determination: The Corps has made the preliminary conclusion that the regulated activities proposed for authorization under the SAMP permitting program (RGP and LOP procedures) have been included as part of the baseline inventory for the applicable State Implementation Plan, or will not exceed federal *de minimus* levels of area source or direct mobile source emissions of any criteria pollutant or its precursors. Subsequent stationary source or indirect source emissions related to the federal action are generally not within the Corps continuing program responsibility and generally cannot be practicably controlled by the Corps. For these reasons a conformity determination is not required for this proposed action, and the direct impacts to air quality from the implementation of the SAMP are expected to be less than significant. Further, the Corps anticipates that future individual LOP and RGP actions are not likely to require further analysis under Section 176, but has included a LOP condition, specified above, applicable to some projects (e.g. those that could result in long-term emissions or that could exceed *de*

minus levels) to ensure conformity with Section 176. Thus, the proposed SAMP/WSAA Process is determined to be consistent with the Clean Air Act.

9.1.6 National Historic Preservation Act (NHPA)

The NHPA, Title 16, USC, Section 470, establishes a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States. The NHPA created the Advisory Council on Historic Preservation (ACHP), an independent federal agency, to advise the President and Congress on matters involving historic preservation. The ACHP is authorized to review and comment on all actions licensed by the federal government that will have an effect on properties listed in the National Register of Historic Places (NRHP), or eligible for such listing. Specifically, §106 of the Act (16 USC 470(f)) requires that a federal agency involved in a proposed project or activity be responsible for initiating and completing the review process. The agency must confer with the State Historic Preservation Office (SHPO) (an official appointed in each state or territory to administer the National Historic Program) and according to the NHPA process.

The NRHP is an inventory of the United States' historic resources and is maintained by the National Park Service. The inventory includes buildings, structures, objects, sites, districts, and archeological resources. The listed properties are not necessarily significant nationally; rather most are significant primarily at the state or local level. As mentioned above, §106 also encompasses significant properties which have not yet been listed or formally determined to be eligible for listing. The proposed RGP and LOP contain the following general condition:

No activity that may affect historic properties listed or eligible for listing, in the NRHP is authorized, until the Corps has complied with the NHPA. If the proposed activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the NRHP, and shall not begin the activity until notified by the Corps that the requirements of the NHPA have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the SHPO and the NRHP.

Consistency Determination: If cultural resources are discovered on a particular project site requiring Corps authorization and are located within the Corps area of potential effect (APE), the Corps, in coordination with the SHPO, will evaluate the cultural resource for eligibility for listing in the NRHP pursuant to the NHPA. Thus, the SAMP/WSAA Process is consistent with the NHPA because any cultural resources discovered on a project site seeking Corps authorization will be appropriately protected as required by the NHPA, per the RGP and LOP condition specified above.

9.1.7 Coastal Zone Management Act

The Coastal Zone Management Act (CZMA) of 1972 was enacted by Congress to encourage states to preserve, protect, develop, and, where possible, to restore or enhance valuable natural coastal resources such as wetlands, flood plains, estuaries, beaches, dunes, barrier islands, and coral reefs, as well as the fish and wildlife using those habitats. Administration of the CZMA was delegated to the National Oceanic and Atmospheric Administration (NOAA). A state with an approved coastal protection program can be delegated the authority to implement the provisions of the CZMA. The Office of Ocean and Coastal Resource Management (OCRM) administers the individual state programs. The California Coastal Commission (CCC) was established in 1972 as the primary lead agency responsible for implementing California's federally-approved coastal management program and Coastal Zone Management Plan. California's coastal management program is carried out through a partnership between state and local governments. The CCC certifies Local Coastal Programs and approves coastal development permits, energy projects, and federal projects consistent with these policies (See also discussion in Section 9.2.2).

Amendments to the CZMA in 1990 entitled Coastal Zone Act Reauthorization Amendments (CZARA) required coastal states to enhance cooperation between land and water use management agencies, identify management measures to prevent and control polluted runoff, and ensure that enforceable mechanisms were in place where voluntary efforts were determined to be insufficient to restore and protect State waters. In response to the new provisions of the CZARA, the CCC entered into a partnership with the SWRCB to implement a statewide plan that would address both the CZARA and CWA requirements regarding coastal waters. The SWRCB has subsequently updated their nonpoint source control plan to include the provisions of the CZARA. EPA and NOAA approved the revised California Nonpoint Source Pollution Control Program (NPS Program) in 2000. The NPS Program identifies activities to be completed by SWRCB in implementing CZARA requirements in the regional Basin Plans and storm water permit programs. To date many of the RWQCB Basin Plans and municipal separate storm sewer system (MS4) NPDES permits have been revised to include CZARA requirements. Additional information regarding the State NPS Program can be viewed at www.swrcb.ca.gov/nps/.

Coastal Zone Management Act (CZMA) consistency determination must be obtained from the CCC for any project impacts to jurisdictional waters located within the Coastal Zone that require authorization from the Corps under the SAMP permitting framework (e.g., LOP, RGP, or SIP). The Corps may request a federal consistency concurrence from the CCC for the Corps' maintenance RGP. An LOP for an individual project affecting the coastal zone will not be issued until CZMA consistency concurrence, or a waiver thereof, is obtained by the applicant. If no consistency determination has been made within 45 days after submittal of a complete application and complies with the conditions of an LOP, the Corps will issue a provisional LOP.

Consistency Determination: Certain restoration opportunities identified in the restoration plan (Smith and Klimas 2004) and included in the SAMP Strategic Mitigation Plan are located within the coastal zone. These include portions of San Joaquin Marsh and Bonita Creek; however, no specified projects are proposed at this time. Most projects seeking authorization under the SAMP/WSAA Process will be located outside the coastal zone and are not likely to affect aquatic resources in the coastal zone. For restoration projects and other regulated activities seeking authorization under the SAMP/WSAA Process

that may affect aquatic resources in the coastal zone, project-specific coastal development permits from the CCC would be required, and concurrence on federal consistency with the CZMA will be sought.

9.1.8 Magnuson-Stevens Fishery Conservation and Management Act

The Magnuson-Stevens Fishery Conservation and Management Act, Public Law 94-265 as amended (Magnuson-Stevens Act), provides for the conservation and management of fishery resources within the U.S. Exclusive Economic Zone (EEZ). It was adopted to extend control of U.S. waters to 200 nautical miles in the ocean; to phase out foreign fishing activities within this zone; to prevent overfishing, especially by foreign fleets; to allow overfished stocks to recover; and to conserve and manage fishery resources.

Congress passed the original Magnuson-Stevens Act in 1976. It has since been amended several times. Among other things, the Act explains the role of regional fishery management councils and describes their functions and operating procedures. The Act includes national standards for management and outlines the contents of fishery management plans. In addition, it gives the Secretary of Commerce power to review, approve, and implement fishery management plans and other recommendations developed by the councils. NMFS (under the Department of Commerce) is charged with stewardship of the nation's living marine resources. With input from the regional councils and stakeholder groups, NMFS provides guidance for applying the National Standards of the Act (Pacific Fishery Management Council, 2004).

The Magnuson Act and was re-authorized by the 104th Congress as the “Magnuson-Stevens Act” on 11 October 1996 to become Public Law 104-297. At present, the Magnuson Act states in its “National Standards” that conservation and management measures shall:

- Prevent overfishing while achieving optimum yield;
- Not discriminate between residents of different states; any allocation of privileges must be fair and equitable;
- Where practicable, promote efficiency, except that no such measure shall have economic allocation as its sole purpose;
- Take into account and allow for variations among and contingencies in fisheries, fishery resources, and catches;
- Minimize costs and avoid duplications, where practicable;
- To the extent practicable, an individual stock shall be managed as a unit throughout its range; interrelated stocks shall be managed as a unit or in close coordination;
- Take into account the importance of fishery resources to fishing communities, consistent with conservation requirements, including prevention of overfishing and rebuilding of overfished stocks;
- Minimize bycatch or mortality from bycatch; and
- Promote safety of human life at sea.

For proposed activities in tidally-influenced waters, including special aquatic sites (e.g., wetlands, vegetated shallows such as eelgrass beds), the Corps is required to consult with the NMFS for potential impacts to Essential Fish Habitat (EFH). Within the San Diego Creek Watershed, EFH consultation may occur for proposed projects within the tidally influenced portions of lower San Diego Creek. A programmatic consultation process is already in place between the Corps and NMFS, as is an eelgrass mitigation policy. Potential impacts will be evaluated to determine if any adverse impact would occur, if the project is in compliance with the programmatic consultation agreement, and if the project would require a consultation.

Consistency Determination: This Draft Program EIS/EIR and related public notice initiates the Essential Fish Habitat (EFH) consultation requirements of the Act, and the Corps has requested concurrence that the SAMP/WSAA Process would not adversely affect EFH. Due to the inland location of most of the SAMP/WSAA Process regulated activities as well as the limited extent of the predicted project activity impacts on EFH resources within Upper Newport Bay, it is initially determined that implementation of the proposed SAMP/WSAA Process would not have an adverse impact on EFH or federally managed fisheries in California waters.

9.2 STATE LAWS

9.2.1 California Water Code

Waters of the State. The California Water Code is the principal State law regulating water quality in California. Waters of the State includes “any surface water or groundwater, including saline waters, within the boundaries of the state” [(Section 13050(e)]. This includes tributaries to waters listed above, isolated waters (e.g. vernal pools, groundwater-supplied wetlands), and vegetated swales with no apparent OHWM. All of these water bodies contain/convey flows during and after precipitation events.

California Water Code contains provisions regulating water and its use. This portion of the California Water Code, Division 7 (Porter-Cologne Act), establishes a program to protect water quality and beneficial uses of the State water resources which includes groundwater and surface water. The SWRCB and the RWQCBs are the principal state agencies responsible for control of water quality. They establish WDRs, water quality control planning and monitoring, enforcement of discharge permits, and groundwater and surface water quality objectives.

The RWQCBs are responsible for the administration of Section 401 of the CWA. Depending on the permitting requirements of the Corps, a water quality certification issued by the RWQCBs may be necessary. If the Corps deems a particular aquatic resource to be “isolated” (and thus not regulated by the Corps Regulatory Program after 2001), the RWQCBs would regulate the isolated resource through the State Porter-Cologne Act. A WDR may be issued for any activities affecting the isolated resource. For example, many vernal pools are “isolated,” and thus would be regulated through Porter-Cologne rather than the CWA.

Consistency Determination: Section 9.1.2 of this Program EIS/EIR discusses the consistency of the SAMP/WSAA Process with CWA Section 401. The Corps cannot issue a permit if a proposed project is expected to violate any State water quality standards or state anti-degradation policy. Consistency with the California Water Code is required in order to proceed under the SAMP/WSAA Process. Thus, the SAMP/WSAA Process is consistent with the California Water Code.

9.2.2 The California Coastal Act

The California Coastal Act of 1976 requires any applicant proposing to undertake development in the Coastal Zone to obtain a coastal development permit. The Coastal Zone extends inland anywhere from approximately 500 yards in developed urban areas to five miles in undeveloped areas. If projects are proposed in or adjacent to existing or historic coastal wetland areas, they will require a coastal development permit issued by the CCC.

Consistency Determination: For those projects in or affecting the coastal zone, the federal CZMA (see Section 9.1.7) requires the applicant to obtain concurrence from the CCC that the project is consistent with the State's Coastal Zone Management Plan prior to issuing the Corps authorization for the project. Although the majority of the Watershed is outside the coastal zone, certain areas around the San Joaquin Marsh (i.e., lower San Diego Creek) are within the coastal zone. Future projects proposed within the coastal zone may require a coastal development permit and will be reviewed for CZMA consistency. See also discussion under CZMA.

9.2.3 The California Endangered Species Act

CESA establishes a state policy to conserve, protect, restore, and enhance endangered and threatened and their habitats and, consistent with that policy, to acquire habitat for such species. CESA also prohibits the taking, importing, exporting, and selling of endangered, threatened, and candidate species (listed species) unless authorized by the Department. The Department may authorize take of a listed species through the issuance of an 'incidental take permit' if: 1) the take is incidental to an otherwise lawful activity; 2) the impacts of the authorized take are minimized and fully mitigated; 3) the permit is consistent with specified CESA regulations, where applicable; and 4) the permittee has adequate funding to implement the minimization, mitigation, and avoidance measures included in the permit. "Take" is defined in FGC Section 86 as: "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill.

Consistency Determination: Given the aquatic resource impact restrictions and general conditions in the RGP, LOP and WSAA Process, as well as the requirements of the NCCP and FESA, future projects authorized through the SAMP/WSAA Process will be consistent with the CESA.